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No. 92-1399

In The

Supreme Court of the United States

October Term, 1992

JOHN ERNSTER and EXCELPRO, INC.,

Petitioners,

vs.

RALSTON PURINA COMPANY and VAN CAMP SEAFOOD COMPANY, INC. and DELTOWN CHEMURGIC CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS RALSTON PURINA COMPANY AND VAN CAMP SEAFOOD COMPANY, INC.

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RESTATEMENT OF THE QUESTIONS PRESENTED

Whether this Court should exercise its discretion to review the Federal Circuit's reversal of a judgment based on jury verdicts where:

(a) the jury found a patent claim valid when it was clearly anticipated under 35 U.S.C. § 102;

(b) the jury found patent claims infringed when those claims, as a matter of law, could not be interpreted so as to be infringed by the process and product in issue;

(c) the jury found trade secrets to have been misappropriated when there was no evidence in the record to show that the trade secrets were, in fact, secret or that the Petitioners had taken any measures to protect the secrecy of them;

(d) the jury found wrongful interference with business expectancies when the record showed nothing beyond legal competitive conduct.

RULE 29.1 STATEMENT

Respondent, Ralston Purina Company, is a Missouri corporation. It has no related corporations other than wholly-owned subsidiaries.

Respondent, Van Camp Seafood Company, Inc., was formerly a wholly-owned subsidiary of Ralston Purina Company. It is now owned by Van Camp Seafood Holding B.V., a Netherlands corporation, and Prudential Insurance Company of America.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS RALSTON PURINA COMPANY AND VAN CAMP SEAFOOD COMPANY, INC.

COUNTER STATEMENT OF THE CASE

Respondents Ralston and Van Camp commenced purchasing from Petitioners in 1984 an additive for use in the canning of tuna fish. Respondents, in that same year, embarked upon a project to

find a source of an alternate additive. Such a source, co-respondent Deltown Chemurgic Corporation (Deltown), was located in 1986. Respondents, thereafter, purchased additive for one canning plant from Petitioners and for another canning plant from Deltown.

The Deltown additive differed from Petitioners' additive in that it was an "enzyme" treated casein rather than alkaline hydrolyzed casein. Significant for present purposes, is that Petitioners' additive was extremely caustic, having a pH in excess of 8.5, while Deltown's additive was a neutral salt, having a pH of approximately 7.

Respondents were aware, at the time the decision was made to purchase the Deltown additive, of the three patents owned by Petitioners. Those patents, in fact, had been studied carefully prior to the decision to add Deltown as a supplier as well as in the development of the Deltown additive. All reasonable steps were taken by Respondents and Deltown to insure that the additive manufactured by Deltown and used by Respondents would not constitute infringement of any valid claim of these patents.

Respondents' patent counsel Hill considered the validity of the '820 patent in late 1984. He concluded, as a result of the existence of a Japanese patent publication published in 1970, that claim 1 of the '820 patent was clearly anticipated under 35 U.S.C. § 102 and, thus, invalid. Hill A4473-74, 4544-47.[1] He considered infringement of the remaining claims of the '820 and '933 patents in 1986. He concluded that none of these claims was infringed since the proposed Deltown additive had a pH at or around 7, whereas the additive which was the subject of the '820 and '933 patents was an alkaline hydrolyzed additive having a pH in excess

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1. Citations to the Joint Appendix filed with the Court of Appeals for the Federal Circuit are "A__." Citations to the Appendix to Petitioners' Petition for Writ of Certiorari are "App. A-__."

of 8.5 ('820 patent) or approximately 10 ('933 patent). Hill A4480, 4482-83. Hill considered, finally, infringement of the '588 patent by the proposed Deltown additive. He concluded that since the enzymes utilized in the process of making the Deltown additive were different from those used in the process of the '588 patent, the '588 patent was not infringed. Hill A4480.

Hill reached each of these conclusions well prior to the purchase and use of any of the Deltown additive by Respondents. These same conclusions were reached independently by outside counsel for Deltown. Herz A5401-05, A E821-74.[2] The accuracy of these conclusions was later confirmed by outside counsel for Respondents. Hill A4526, 4536-37. These conclusions parallel precisely the findings of the Court of Appeals for the Federal Circuit here at issue.

Petitioners brought suit against Respondents and Deltown in 1987, charging Respondents with infringement of these three patents, conspiracy to infringe these patents, breach of contract and misappropriation of trade secrets.[3] The complaint also contained unjust enrichment and fraud claims based upon the misappropriation of trade secrets.[4] The jury found for Petitioners

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2. Deltown counsel, when rendering his opinion, did not have the Japanese publication available, so the opinion made no reference to it.

3. Deltown was charged, separately, with tortious interference with business relationship. The jury found for Petitioners on this count. Deltown's judgment notwithstanding the verdict motion was denied. The resultant judgment was also reversed by the Federal Circuit.

4. The breach of contract count was based on an alleged oral undertaking by Respondents to purchase their requirements of tuna fish additive from Petitioners for an unspecified period of time. The misappropriation of trade secrets count was also based upon an alleged oral contract and, as developed during discovery, involved a laundry list of alleged secrets which proved, on inspection, to be anything but secret. Many of the items, in fact, were specifically recited in the three patents. App. A-11-13.

on each of those counts excepting the breach of contract count. The trial court denied Respondents' motions for judgment notwithstanding the verdict. Respondents appealed to the Court of Appeals for the Federal Circuit. That court reversed all judgments against Respondents.

The Federal Circuit opinion is nonprecedential in accordance with Rule 47.8 of that court. As such, it may be somewhat more abbreviated than would be the case had it not been "unanimously determined by the panel at the time of . . . [its] issuance as not adding significantly to the body of law."[5] The opinion, nevertheless, sets forth clearly the bases upon which the court reversed each of the judgments below.

The opinion concludes with respect to claim 1 of the '820 patent:

> Thus, the Japanese patent discloses every limitation of claim 1, rendering claim 1 invalid by anticipation.
>
> On this record, *no reasonable jury* could have found claim 1 of the '820 patent valid.

Emphasis supplied. App.A-5.

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5. The trend to dispose of cases by short unpublished memorandum decisions has arisen out of necessity due to the heavy caseloads facing courts today. *Nat'l Classification Comm. v. United States*, 765 F.2d 164, 172 (D.C. Cir. 1985) ("the heavy caseload in this court necessitates the disposition of a large percentage of cases by order or short unpublished memorandum opinions"); *Michigan Lawyers Weekly*, April 29, 1991, p. 12 ("the reality of the burgeoning appellate case load is that the fact-specific, jurisprudentially simple cases whose resolution is mandated by settled precedent, must be decided in short, simple, and abbreviated unpublished opinions and orders").

The opinion concludes with respect to claims 2-11 of the '820 patent:

> Claims 2-11, however, do not place the "pH of at least 8.5" limitation on a sifted-out "portion" of the casein combination. Rather the claims cover a "combination" which has a pH of at least 8.5. As such, claims 2-11 do not read on the accused product. Because *no reasonable jury, applying properly interpreted claims,* could have found infringement of claims 2-11 of the '820 patent, this court reverses that determination.

Emphasis supplied. App.A-5-6.

The opinion concludes with respect to the '933 patent:

> In sum, every claim in the '933 patent contains some limitation—*either express or evident from the prosecution history*—to a pH of approximately 10. Nothing in the '933 patent indicates that the phrases "reaction vessel" and "contents of the reaction vessel" mean anything other than the contents as a whole. The pH claim limitations in the '933 patent refer to the pH of the entire hydrolyzed protein product, not to the pH of sifted portions of the product.
>
> * * *
>
> *Properly interpreted,* the claims of the '933 patent do not read on the accused process. Because *no reasonable jury,* applying properly

> interpreted claims, could have found infringement of any of the claims of the '933 patent, this court reverses.

Emphasis supplied; citations omitted. App. A-8-9.

The opinion concludes with respect to the '588 patent:

> Because the '588 patent does not literally encompass the accused process or product, the jury must have found infringement under the doctrine of equivalents.
>
> The doctrine of equivalents, however, cannot recapture for the patentee matter disclaimed during prosecution of the patent or matter in the prior art when the patent issued.
>
> * * *
>
> *Prosecution history estoppel* prevents Mr. Ernster from acquiring coverage for matter in the prior art and for matter he specifically disclaimed during prosecution.
>
> *No reasonable jury* could have found the *properly construed claims* of the '588 patent to cover the accused process.

Emphasis supplied; citations omitted. App. A-9-10.

The opinion concludes with respect to trade secret misappropriation:

> In sum, Mr. Ernster did not show that his

> alleged secrets were secret at all or that he took steps to ensure their secrecy. Under applicable Missouri law, *no reasonable jury* could have found that Mr. Ernster possessed trade secrets.

Emphasis supplied. App. A-13.

The opinion concludes with respect to wrongful interference with business expectancies:

> The record shows that Deltown was an active competitor in the market. The record discloses, however, nothing beyond this legal competitive conduct. Once again, this record does not contain sufficient evidence to convince *any reasonable jury* that Deltown wrongfully interfered with appellees' business expectations.

Emphasis supplied. App. A-13.

REASONS FOR DENYING THE WRIT

The petition should be denied because it totally lacks any "special and important reasons" for granting it, as required by Rule 10.1 of this Court. Clearly, there is no conflict between the judgment of the Court of Appeals for the Federal Circuit for which review is sought and any decision of another court of appeals, since the Federal Circuit has exclusive jurisdiction over patent appeals. 28 U.S.C. § 1295(a). Nor has the Federal Circuit in its judgment "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision," as specified in Rule 10.1 (a) of this Court.

Rather, the Federal Circuit in this case conducts itself well within "the accepted and usual course of proceedings." It performs

the precise function which is required of it and its companion appeal courts—the review of lower court judgments to insure that they all have been entered in accordance with applicable law. *Cuddy v. Carmen*, 762 F.2d 119, 123 (D.C. Cir.), *cert. denied*, 474 U.S. 1034, 106 S. Ct. 597 (1985); *Matter of McLinn*, 739 F.2d 1395, 1401 (9th Cir. 1984); *United States v. Cruz*, 581 F.2d 535, 541 (5th Cir. 1978), *overruled on other grounds*, 834 F.2d 1179 (5th Cir .1987).

Petitioners, at pages 10-16 of the petition, in a desperate attempt to generate "special and important reasons" where none exists, indict the Court of Appeals for the Federal Circuit, not for the manner in which it decided the case at bar, but for the manner in which it has allegedly decided other cases. The indictment, moreover, is based almost exclusively on cases decided during the infancy of that court, 1983-1986.

The simple fact of the matter is what the Court of Appeals for the Federal Circuit did or did not do during this period, while of probable historical interest to legal scholars, is totally irrelevant to whether this Court should grant the writ which Petitioners request. Relevant, rather, is what the Court of Appeals for the Federal Circuit is doing currently and, specifically, what it did in the case at bar.[6]

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6. This Court, in April 1986, vacated a judgment of the Court of Appeals for the Federal Circuit and remanded the case for further consideration in light of Rule 52(a). This Court, in the remand, expressed concern that the Federal Circuit had not explicitly applied the clearly-erroneous standard to the district court's findings on the obviousness of a patent. *Dennison Mfg. Co. v. Panduit Corp.*, 475 U.S. 809, 811, 106 S. Ct. 1578, 1579 (1986). This Court, over the ensuing years, has not seen fit to grant further petitions raising this issue, despite repeated opportunities to do so. The reason is obvious. If, in fact, the Federal Circuit prior to *Dennison* was doing something wrong, it has now corrected the problem.

Petitioners' questions which are presented for review are not really questions in the context of this case. Respondents, in fact, do not disagree: (1) that the Court of Appeals for the Federal Circuit is bound by the established standard of appellate review when reviewing factual determinations made by a jury in a patent case; and, (2) that the Seventh Amendment requires the Court of Appeals for the Federal Circuit in a patent case to apply the same "sufficiency of evidence" test to a jury's factual determinations that is applied by all other circuit courts in civil jury cases. That the Court of Appeals for the Federal Circuit, likewise, does not disagree with these postulates is evident from even a cursory reading of its decision in this case.

Petitioners, throughout the petition, treat the Seventh Amendment as though it were intended to shield judgments based on jury verdicts from appellate review. The treatment is couched in the argument that the Federal Circuit applied the wrong standard in its dealings with the jury's factual determination. The Federal Circuit, in fact, applied not only the correct standard, it applied the very standard advocated by Petitioners.

Petitioners argued before the Federal Circuit that the court could reverse jury factual determinations only in the event they were convinced those determinations were not supported by substantial evidence—*i.e.*, by such relevant evidence from the record taken as a whole as might be accepted by a reasonable mind as adequate to support the findings under review.[7] The Federal Circuit referenced this so-called "reasonable juror" standard throughout the opinion here in issue. A reading of the opinion leaves no doubt, moreover, that this repeated reference was not mere lip service. The standard was substantively applied in each instance where it was necessary.

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7. Brief of Plaintiffs-Appellees and Cross-Appellants John H. Ernster and Excelpro, Inc., pp. 22-23.

Illustrative is the Federal Circuit's ruling that claim 1 of the '820 patent was anticipated by the Japanese publication. At issue, under well-settled principles of patent law, was whether or not the Japanese publication disclosed each limitation set forth in the claim. *Ralston Purina Co. v. Far-Mar-Co, Inc.*, 772 F.2d 1570, 1574 (Fed. Cir. 1985). It is the claim that is anticipated, not the specification. *Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560, 1571 (Fed. Cir.), *cert. denied*, 488 U.S. 892, 109 S. Ct. 228 (1988). An unclaimed difference will not avoid anticipation. *SSIH Equip., S.A. v. United States Int'l Trade Comm'n*, 718 F.2d 365, 378 (Fed. Cir. 1983).

The Federal Circuit, at pages 4 and 5 of the opinion, demonstrated that the Japanese publication discloses each limitation of claim 1 of the '820 patent. It is readily apparent from even a cursory review of that demonstration that there was no controversy whatever as to what the Japanese publication taught or what the words of the claim were intended to mean. There were not two permissible views of the evidence. The only permissible view dictated a finding of anticipation. No reasonable jury could have found otherwise, and the Federal Circuit so held.

Petitioners next reference credibility determinations, arguing that it was the jury, not the Federal Circuit, that had the opportunity to observe the witnesses. Petitioners' argument would have merit if the Federal Circuit had substituted its view of the testimony for the jury's view. The Federal Circuit opinion, however, involves no such substitution. Exemplary are the rulings regarding noninfringement of the '820 patent and the '933 patent by the Deltown additive and the process of making and using it.

The testimony at trial from all witnesses, including Petitioner Ernster, was unanimous that the Deltown additive had an overall neutral pH of approximately 7. Ernster A5186, 5240-41. Petitioners did call witnesses who testified that sifted-out portions

of this Deltown additive had a pH in excess of 7. At no point in the appeal, however, was the accuracy of any of this testimony brought into question. At issue, rather, was whether claims 2-11 of the '820 patent and the claims of the '933 patent were directed to the Deltown additive as a whole or to sifted-out portions of the additive. The issue, in other words, was patent claim interpretation.

This issue (also called claim construction) was ruled by this Court as early as 1895 to be a question of law. *Coupe v. Royer*, 155 U.S. 565, 577, 15 S. Ct. 199, 204 (1895). The Federal Circuit has repeatedly and consistently so held. *See, e.g., Loctite Corp. v. Ultraseal, Ltd.*, 781 F.2d 861, 866 (Fed. Cir. 1985); *Senmed Inc. v. Richard-Allan Medical Indus., Inc.*, 888 F.2d 815, 818 (Fed. Cir. 1989).[8]

The Federal Circuit, applying this well-settled principle of patent law, determined that claims 2-11 of the '820 patent were not directed, as a matter of law, to "sifted-out portions" of the Deltown additive but, rather, to the Deltown additive as a whole. The court then concluded that since the Deltown additive as a whole had an undisputed pH of around 7, no reasonable jury could have found it to infringe these claims which called for an additive having an overall pH of at least 8.5.

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8. While in some situations issues of fact involving the meaning of claim terms may arise, *Perini America, Inc. v. Paper Converting Machine Co.*, 832 F.2d 581, 584 (Fed. Cir. 1987); *SmithKline Diagnostics, Inc. v. Helena Laboratories Corp.*, 859 F.2d 878, 882 (Fed. Cir. 1988), the case at bar is not one of those situations. The Federal Circuit, in fact, specifically noted this exception to the general rule, and it specifically ruled out its applicability in this case—*i.e.*:

> Although a patentee may be his own lexicographer, when the patent contains no alternative definition for a claim term, the term is given its ordinary meaning.

App A-9.

The Federal Circuit's infringement analysis of the '933 patent involved, additionally, the doctrine of prosecution history estoppel (formerly file wrapper estoppel).[9] This issue, like the issue of claim construction of which it forms a part, is also a question of law. *LaBounty Mfg. Inc. v. United States Int'l Trade Comm'n*, 867 F.2d 1572, 1576 (Fed. Cir. 1989); *Sun Studs, Inc. v. ATA Equip. Leasing, Inc.*, 872 F.2d 978, 986-87 (Fed. Cir. 1989). A patentee, as a matter of law, may not adopt a claim interpretation disavowed during prosecution. *Jonsson v. Stanley Works*, 903 F.2d 812, 817-18 (Fed. Cir. 1990)

The court analyzed in some detail the prosecution history of the '933 patent. It then concluded as a matter of law that all claims in this patent were limited to an additive which, as a whole, had a pH of approximately 10. Since the Deltown additive, as a whole, had an undisputed pH of approximately 7, the Federal Circuit concluded that no reasonable jury could have found it to infringe the '933 claims.

The Federal Circuit did not question the credibility of the testimony that "sifted-out portions" of the Deltown additive had a pH in excess of 7. It found, rather, that the testimony was irrelevant to the issue of infringement of the claims of the '820 and '933 patents. It found that the claims of those patents, properly interpreted as a matter of law, were directed to the whole rather than to "sifted-out portions."

Petitioners' discussion of the doctrine of equivalents in connection with the '588 patent shows, at best, a gross misunderstanding of the doctrine of prosecution history estoppel. It is correct that by application of the doctrine of equivalents a product or process that does not literally infringe a claim may

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9. This issue was also involved in the Federal Circuit's legal interpretation of the claims of the '820 patent. *See* App. A-5, fn 2.

infringe if "it performs substantially the same function in substantially the same way to obtain the same result." *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 339 U.S. 605, 608, 70 S. Ct. 854, 856 (1950). Prosecution history estoppel, however, limits a patentee's right to resort to the doctrine of equivalents by preventing him from contending later in an infringement action that his claims should be interpreted as if limitations added by amendment were not present. *Thomas & Betts Corp. v. Litton Sys., Inc.*, 720 F.2d 1572, 1579 (Fed. Cir. 1983). File wrapper estoppel, as already noted, is a question of law. *LaBounty*, 867 F.2d at 1576. Once it is found applicable, reliance on the doctrine of equivalents to expand claims beyond the literal language which they contain is precluded. *Townsend Eng'g Co. v. HiTec Co.*, 829 F.2d 1086, 1091 (Fed. Cir. 1987). Any other interpretation would permit a patentee's recapturing of what was forfeited in obtaining the patent, a result contrary to a fundamental underpinning of patent law. *Senmed*, 888 F.2d at 821 .

The Federal Circuit examined the prosecution history of the '588 patent. It determined that Petitioners "emphasized" the importance of the specific enzymes listed as limitations in the claims. It determined, moreover, that the enzymes used in the allegedly infringing Deltown additive were identical to the enzymes utilized by the prior art. Given the legal conclusion that the scope of the claims of the '588 patent was limited to the enzymes specifically recited, no reasonable jury could have found the Deltown additive, which incorporated enzymes different from those recited, to infringe. Indeed, given the uncontested fact that the Deltown additive used the very same enzymes as the prior art, no reasonable jury could have found the '588 claims infringed. The Federal Circuit properly so held .

The Federal Circuit commenced its analysis of the trade secret issue by reviewing applicable Missouri law, noting specifically the requirements that trade secrets, in fact, be secret and that the

proprietor take reasonable measures to keep them such. It next analyzed the specific secrets which Petitioners alleged to have been purloined, noting that some were disclosed in the three patents in suit while others were circulated widely in the trade without Petitioners even attempting to retain control of them. It is little wonder that the Federal Circuit, after this analysis, ruled that Petitioners had failed to prove the existence of protectable trade secrets.

Yet, Petitioners continue to press this issue. Here they treat the Seventh Amendment as though it were some sort of blindfold intended to mask the truth. They argue, contrary to law, that the jury somehow has the power to remove from the public that which, by definition, is public, or to "erase" from the patents in suit the information which they contain. Their argument is both illogical and wrong.

There is the issue, finally, of the Federal Circuit's reversal of the judgment pertaining to wrongful interference with business expectancies. While this judgment went against Deltown, not the undersigned Respondents, the total lack of evidentiary basis for it demands attention in this response. This judgment, along with that pertaining to trade secrets, shows beyond peradventure that the jury in this case somehow failed in its assigned task, and that the district judge did little, if anything, to correct that failure, leaving to the Federal Circuit the task of effectively setting aside the verdicts in order to prevent a gross miscarriage of justice.

Significant to this inquiry is the fact that the jury, in its only finding favoring Respondents, determined that there was no contract governing how much additive, if any, would be purchased by Respondents from Petitioners or during what period of time such purchases were to be made. App. A-23. Even had the jury been legally justified in determining that Deltown had somehow interfered with this nonexistent contract, there was absolutely no

evidence whatever in the record tending to show that the interference lacked justification. While there may have been an expectancy by Petitioners to continue selling to Respondents, it has never been a tort to compete or to bid for a customer's business. *Restatement (Second) of Torts* § 768; *Henry v. Chloride, Inc.*, 809 F.2d 1334, 1351 (8th Cir. 1987).

The Court of Appeals for the Federal Circuit held that the record showed nothing by Deltown beyond legal competitive conduct and, thus, did not contain sufficient evidence to convince any reasonable jury that Deltown wrongfully interfered with Petitioners' business expectations. The Federal Circuit was clearly correct in this holding as well as its other holdings.

CONCLUSION

There are no "special and important reasons" why this Court should grant the requested writ. This is but a routine case. The jury, in a series of mistakes, made findings which were not supported by substantial evidence. The Court of Appeals for the Federal Circuit rectified those mistakes by reversing the judgments which resulted from them.

Respectfully submitted,

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